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No. 86-1252

In The

Supreme Court of the United States

October Term, 1986

WILLIAM DANIEL O'KELLEY, DONNA O'KELLEY KILGORE and PATRICIA WILLIAMS, as mother and next friend of CAROL ANN O'KELLEY and CHRISTOPHER TODD O'KELLEY, minors,

Appellants,

v.

HOSPITAL AUTHORITY OF GWINNETT COUNTY, d/b/a GWINNETT AMBULANCE SERVICE, METRO AMBULANCE SERVICES, INC., CARLSON SOUTH-EAST CORP., ESTER REIFMAN,

Appellees.

On Appeal From The Supreme Court Of The State Of Georgia

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Do the children of the decedent have a protected property interest in the wrongful death cause of action that involves the Due Process Clause?

2. Is the challenged statutory scheme that allegedly deprives the decedent's children of their protected property right wholly arbitrary or irrational, thus warranting action by this Court?

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MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Georgia on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

A. Proceedings Below

Less than one month after the death of William Harold O'Kelley, his four children filed suit against the appellees in the county where Mr. O'Kelley's surviving spouse, Daisy O'Kelley, resided. Daisy O'Kelley filed a motion to intervene in the suit filed by the children indicating that their Complaint had been filed without her knowledge or consent. Daisy O'Kelley noted that she was the proper person to maintain the action for the wrongful death of Mr. O'Kelley, and she asked to be added as a party plaintiff.

Before Daisy O'Kelley's motion to intervene could be heard, the O'Kelley children dismissed the action without prejudice and brought a new action in the State Court of Fulton County, Georgia. Before any attempt was made by Daisy O'Kelley to intervene in that action, it was dismissed by the trial court because the children had no cause of action for the wrongful death of their father under Georgia law.

The Supreme Court of Georgia affirmed in a brief opinion. 256 Ga. 373, 349 S.E.2d 382 (1986). The Supreme Court did not, as asserted by the children in their Jurisdictional Statement, accept their contention that the children of a decedent possess a property right in any wrongful death action. Rather, the Georgia Supreme Court merely noted that "any property interest that children might have in an action for a parent's wrongful death" is adequately protected for constitutional purposes. 256 Ga. at 374. The surviving spouse owes fiduciary duties to the children as the personal representative vested with the right (and

duty) to pursue the wrongful death claim on behalf of the statutory beneficiaries. A breach of those duties would give the children a cause of action against the personal representative, the surviving spouse. The court went on to say that the legislature had not given the children a right to share in the control of an action for wrongful death, but only a right to share in any proceeds of such an action. This treatment by the legislature of such a "delicate and emotional area of the law" was found to be constitutionally adequate.

On January 30, 1987, Daisy O'Kelley filed suit against the appellees in the Superior Court of Fulton County, seeking damages for the wrongful death of her deceased husband on her behalf and for the benefit of the O'Kelley children.

B. The Statute

The Georgia wrongful death statute provides that the cause of action for wrongful death is vested in the decedent's surviving spouse who holds any recovery for the use of the statutory beneficiaries. O.C.G.A. § 51-4-2. If there is no surviving spouse, then the surviving children become vested with the cause of action. If neither spouse nor child survive, then the administrator or executor of the decedent may bring the cause of action and hold the amount recovered for the benefit of the next of kin. O.C.G.A. § 51-4-5. The damages to be awarded are the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived. O.C.G.A. § 51-4-1. There is no requirement that the statutory beneficiaries (surviving spouse and children, or, if none, next of kin) show any financial dependency

upon the decedent, and the statutory scheme is punitive in nature and is not designed to compensate any particular loss to the statutory beneficiaries. *Har-pen Truck Lines, Inc. v. Mills,* 378 F.2d 705 (5th Cir. 1967); *Atlantic, Valdosta and Western Railroad Co. v. McDilda,* 125 Ga. 468, 54 S.E. 140 (1906). The sums recovered in a wrongful death action shall be divided equally between the statutory beneficiaries, except that the surviving spouse will keep at least one-fourth of the recovery. O.C.G.A. § 51-4-2(d).

The O'Kelley children assert that the statute violates the Due Process Clause because it allegedly guarantees them a protected property right in the unliquidated cause of action itself, but then effectively eliminates their right by giving the surviving spouse the exclusive rights to file the cause of action in her name and to settle all claims.

———o———

ARGUMENT

While it could be argued that this Appeal has been mooted by the filing of a wrongful death suit by Daisy O'Kelley on behalf of all statutory beneficiaries, including the children, some of the underlying questions will persist. Appellees do not want to settle the wrongful death claim with Daisy O'Kelley, only to be sued again by the children alleging they have a right to a separate action because they did not approve the settlement. Appellees will, therefore, argue the issues raised below.

A. Appellants Have No Protected Property Interest Requiring Due Process Protection

The requirements of procedural due process apply only to the deprivation of interests encompassed by the

Fourteenth Amendment's protection of liberty and property. *Board of Regents v. Roth,* 408 U.S. 564 (1972). In determining whether the Due Process Clause is implicated, the Court must first look to see if the interest at stake is within the Fourteenth Amendment's protection of liberty and property. Protected property interests may take many forms, but they must be grounded in a particular statute, rule or accepted principle:

> Property interests, of course, are not created by the Constitution. Rather, they are created and *their dimensions are defined* by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. [Emphasis supplied.]

Roth, 408 U.S. at 577. The O'Kelley children contend that the Georgia wrongful death statute, by designating children as statutory beneficiaries, creates in the children a protected property interest in the cause of action itself, even though the statute clearly defines the dimensions of their interest in a way that precludes such an argument.

The property right that is being claimed by the O'Kelley children is an entitlement to the unliquidated wrongful death cause of action itself. Any entitlement to the wrongful death cause of action must be based entirely upon the statute, because actions for wrongful death in Georgia are purely statutory and exist only in the form and with the limitations chosen by the legislature. *Hughes v. Parham,* 241 Ga. 198, 208, 243 S.E.2d 867 (1978), *aff'd,* 441 U.S. 347 (1979). Although the Georgia statute in question unambiguously provides that the cause of action for the wrongful death of Mr. O'Kelley is conferred upon

Daisy O'Kelley to the exclusion of the children, the children argue that this is merely a procedural elimination of a property right that has already been given to them by statute. The children attempt to translate their statutorily created interest in a share of the funds generated by the surviving spouse's cause of action into a direct entitlement to bring the cause of action in their own names, or at least an entitlement to control the action. But the Georgia legislature, in creating the cause of action, clearly defined the dimensions of the cause of action to deny children an entitlement in the action itself, and specifically denied them any entitlement to control a settlement by the surviving spouse. Since their claim to due process depends upon the existence of a property right in the unliquidated cause of action itself, and since the state has not conferred upon them such a property right, the constitutional challenge of the children must fail.

In support of this claim to a protected property right, the Jurisdictional Statement of the O'Kelley children cites a few Georgia cases and moves on. None of the cases cited makes any attempt to establish that a decedent's children have a protected property interest in an unliquidated wrongful death cause of action for due process purposes. Moreover, the Georgia decisions cited were written prior to the 1974 Amendment to the Georgia wrongful death statute which was enacted to correct those decisions by specifically giving the surviving spouse authority to settle the action for wrongful death without the concurrence of the children. F. Eldridge, *Wrongful Death Actions: The Law in Georgia* § 1-24 (1976). More recent Georgia Supreme Court decisions have specifically held that children of a decedent have *no interest whatsoever* in the cause

of action for their parent's death where the parent is survived by a spouse. *E.g., General Motors Corp. v. Rasmussen,* 255 Ga. 544, 340 S.E.2d 586 (1986). Therefore, neither the statute itself nor the case law interpreting it supports the claim by the O'Kelley children to a protected property right in the unliquidated cause of action itself.

The O'Kelley children rely heavily upon *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). That case concerned the issue of whether a state may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure. The Court rejected the implicit finding by the Illinois Supreme Court that no individual entitlement could come into being in favor of Logan until after the statutorily acquired administrative action was timely taken by the appropriate state administrator. This Court correctly pointed out that the state had specifically guaranteed to Logan a cause of action, or a right to redress the alleged discrimination, but subsequently eliminated the statutorily created cause of action altogether by a procedural limitation. This Court found that Logan had a protected property interest in his cause of action, and went on to rule that the state could not procedurally eliminate his cause of action without appropriate procedural safeguards.

The important difference between this case and *Logan* is that the state had affirmatively conferred upon Logan himself a cause of action to redress his discrimination grievance, and his right to redress was guaranteed by the state. The Georgia death statute, on the other hand, does not confer upon the children a cause of action to redress any

grievance whatsoever; rather, the cause of action is conferred upon the decedent's surviving spouse, and the right to redress is guaranteed by the state to the surviving spouse, not the children. Indeed, since the purpose of the statute is to punish the wrongdoer rather than compensate survivors, the surviving spouse may recover even if she has long been separated from and financially independent of the decedent, since the wrong being redressed is the decedent's death, not the spouse's (or the children's) loss.

The O'Kelley children attempt to compare their interest to that of the trust beneficiaries in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The treatment of the trust beneficiaries in *Mullane*, however, is totally consistent with the treatment of the O'Kelley children below. The *Mullane* Court found that a state law violated the Due Process Clause because it terminated rights already vested in trust beneficiaries to bring a cause of action against the trustees for breach of fiduciary duties. The trust beneficiaries were otherwise vested with such a cause of action because they were the owners of the trust funds that were allegedly mismanaged.

Likewise, the O'Kelley children are vested with a cause of action against the surviving spouse if she were to breach her fiduciary duty to the statutory beneficiaries to properly collect, manage and distribute any funds recovered in the wrongful death claim. The children are not complaining that their cause of action against the surviving spouse is procedurally impaired, which might be prohibited by *Mullane*. Rather, they are claiming that they have not been given a cause of action to sue the alleged wrongdoers for the death of their father. In terms of *Mullane*, this would be similar to the *Mullane* trust beneficiaries complaining

that they were not entitled to sue in their own names to recover a claim that belonged to the trustee for the collection of funds that were to be deposited in the trust, such as interest earned on investments. If a state law indeed vested the trustee, rather than the trust beneficiaries, with the exclusive right to pursue the claim against the trustee's creditors, would that state law violate the Due Process Clause because the trust beneficiaries could not sue the creditors directly? That issue was not before this Court in *Mullane*, but that is the only issue now before this Court.

The Georgia wrongful death statute confers upon the O'Kelley children no protected property interest in the cause of action for the wrongful death of their father. *Cf., In re Estate of White*, 289 Or. 13, 609 P.2d 365 (1980) (statutory beneficiaries have no property right in Oregon wrongful death claim). The rights of the children are limited to a share in the distribution of the proceeds and to a remedy against the surviving spouse if, in her management of the claim, she breaches her duty to act prudently in asserting, prosecuting and settling the claim. *Mack v. Moore*, 256 Ga. 138, 345 S.E.2d 338 (1986). Nowhere has the legislature given the children the equivalent of a protected property right in the unliquidated cause of action itself, and therefore they have no basis to complain that the statute violates the Due Process Clause.

B. Even If Appellants Have a Protected Property Interest at Stake, the Statute Cannot be Characterized as an Invalid Deprivation of Property

Even if this Court accepts the contention that the status of the children as statutory beneficiaries gives them a protected property interest in the death action against

the alleged wrongdoers, the inability of the children to control the progress of the claim is not a "deprivation" warranting intrusion by this Court.

This Court was faced with a similar due process challenge to a state statute in *Martinez v. California,* 444 U.S. 277 (1980). In that case, a state wrongful death claim was asserted against state officials who were responsible for the parole release of the man who subsequently murdered the decedent. The wrongful death claim against the state officials was barred by a California statute which granted the officials absolute immunity from liability for any injury resulting from a parole release decision. In rejecting the contention that the immunity statute violated the Due Process Clause, this Court assumed, for the sake of argument, that the cause of action for wrongful death that the state had created was a species of "property" protected by the Due Process Clause.[1] This Court went on to state:

> On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

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[1] This Court noted, however, that the state had the right to define the tort claim in such a way as to limit it to certain defendants through an immunity statute. It was therefore arguable that the plaintiffs had no "property interest" in the wrongful death claim against the state officials that would trigger the protections of the Due Process Clause. *Id.,* 444 U.S. at 487, n.5.

Martinez, 444 U.S. at 487. Since this Court had no difficulty in accepting the State's conclusion that there was a rational relationship between the State's purposes and the immunity statute, the Court found no merit in the contention that the immunity statute was unconstituional when applied to defeat a tort claim arising under state law:

> Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination.

Martinez, 444 U.S. at 488.

In this case, even if the Court assumes that the O'Kelley children have a protected property interest in the cause of action for the wrongful death of their father, and if the Court goes on to assume that the legislature's requirement that the surviving spouse bring the action is a deprivation of their property right, this Court should nevertheless uphold the constitutionality of the Georgia statute because it is designed to promote policies that reasonable lawmakers may favor. The legislature may reasonably want all wrongful death claims to be brought by a single party in a single action, thereby promoting judicial economy. The statute may avoid problems peculiar to causes of action vested in minors. For example, if minor children were vested with a separate claim for the wrongful death of their father, could they be forced to join with their stepmother to prosecute any wrongful death claim within two years, or are they allowed to wait until they reach majority to assert their separate claim? The present scheme also

avoids the prospect of an unknown illegitimate child of the decedent coming forward after the alleged wrongdoers have reached what they thought was a final settlement with the legitimate children and surviving spouse of the decedent. Georgia's statutory procedure therefore eases and simplifies the administration of wrongful death actions.

The legislature may have designed the present statutory scheme to reduce the potential for intrafamily conflict that is so apparent in this case. By giving one family member control to settle the claim for all, the other family members have an obvious interest in working with that family member to promote a successful outcome of the case. The statutory scheme should, therefore, promote family harmony and cooperation, if for none other than selfish reasons.

The facts of this case certainly highlight the wisdom of the legislature in its attempt to encourage family harmony. The O'Kelley children have refused to cooperate with their stepmother on the assumption that they could file a separate suit in their own names. They have aggressively fought her every step of the way. They immediately filed suit within a month of Mr. O'Kelley's death, and then dismissed their action when she attempted to join them in the same lawsuit. They then ran to another county to file their separate claims. When appellees moved to dismiss, the children filed affidavits viciously attacking Daisy O'Kelley and her attorney as "incompetent" although they also admit that they do not know her very well. They attacked Daisy O'Kelley's appointment as administratrix of her husband's estate, and they persuaded the Probate Court to remove her on the basis that the children, beneficiaries of the estate, do not trust her judgment as administratrix.

(Jurisdictional Statement, A-18.) Finally, they have asked the trial court, the Georgia Supreme Court and now this Court to give them the opportunity to wrest control of the wrongful death action from their stepmother whom they so evidently disdain. The Georgia statute, by giving the surviving spouse the exclusive right to pursue and settle the wrongful death claim, discourages the selfish and unnecessary attacks conducted by the O'Kelley children.[2]

In fashioning its rules of tort law relating to wrongful death claims, Georgia has broad powers to promote rational purposes in what the Georgia Supreme Court termed below "this delicate and emotional area of the law." It is not necessary that the state adopt the best of all possible legislative schemes to promote those purposes. Nonetheless, the O'Kelley children have not even proposed an alternative system that is superior to Georgia's present legislative scheme.

The O'Kelley children suggest that Georgia's adoption of the most common system, the appointment of a personal representative to sue on behalf of the statutory beneficiaries, would answer the alleged deficiencies in Georgia's statutory scheme. But the only difference between Georgia's system and the personal representative system is that Georgia automatically and permanently appoints the surviving spouse as the personal representative. Both

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[2] These attacks are "unnecessary" because Daisy O'Kelley has not failed to prosecute the claim for wrongful death. Rather, she has shown her desire to pursue the claim all along by attempting to intervene in the original action brought by the children, and she has now filed her own action.

owe fiduciary duties to the statutory beneficiaries, and both are subject to civil liability to the beneficiaries for mismanagement of the claim. Contrary to the suggestion of the children, neither are subject to a bond requirement. Even though most states provide that the personal representative will be the administrator or executor of the decedent's estate, the wrongful death action is not pursued and the recovery is not held by the personal representative in his capacity as administrator or executor. The wrongful death proceeds are not part of the decedent's estate, are not subject to claims of creditors and are not distributed according to the decedent's will or by the laws of intestate succession. Rather, the proceeds go directly to the statutory beneficiaries without ever becoming estate property. Therefore, the beneficiaries of any wrongful death action would have no claim against the bond that the representative posted to protect the beneficiaries of the estate against his misfeasance in handling estate property.

Even if the bond requirement for administrators and executors set out in O.C.G.A. § 53-7-30 were made applicable to protect statutory beneficiaries of a wrongful death claim, there is no reason to assume that such a bond would afford the "protection" sought by the O'Kelley children. That statute requires a bond that is twice the value of decedent's estate. Since the decedent's estate does not include damages awarded for his wrongful death, the decedent's estate may have little or no pecuniary value and therefore a minimum bond, if any, would be required. Whether the cause of action is mismanaged by the surviving spouse or by an executor or administrator acting as the personal representative of the statutory beneficiaries, the mismanagement of the wrongful death claim may leave the statutory beneficiaries with a claim for breach of fiduciary

duties against a judgment proof individual. Viewed in this light, the statutory beneficiaries are actually better off with the cause of action being automatically vested in the individual who has the most to gain personally in any recovery, the surviving spouse. An executor or administrator, on the other hand, may have nothing to gain in pursuing the action and nothing to lose in squandering it.

Regardless of this Court's personal opinion about the fairness of one proposed system over another, the fact is that family squabbles and hard feelings are going to occasionally surface under *any* system. In creating rights that did not exist at common law, the legislature may fashion its own rules, and those rules should be scrutinized only to protect the individual citizen from state action that is wholly arbitrary or irrational. Even if the Court might fashion a rule that it would find more appropriate under the circumstances, the Court has traditionally declined requests to second guess the legislatures in fashioning state policy in areas such as this: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965).

This Court has previously been asked to expand the damages provided by Congress in the wrongful death statute creating a remedy in admiralty for wrongful deaths at sea. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978). In that case, the Court declined to second guess the Congress by awarding more damages to statutory beneficiaries than provided by the Death on the High Seas Act:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Con-

> gress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries. Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress did in 1920, but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

436 U.S. at 625-26.

To be sure, the Georgia system may not operate perfectly to satisfy all potential beneficiaries of any award of wrongful death damages. That fact, alone, does not mandate a review by this Court of the fairness of the statute, since it has not been shown that the children are being deprived of a protected property interest by state action that is wholly arbitrary or irrational. It is submitted that the Georgia wrongful death statute cannot be characterized as an invalid deprivation of property, and, therefore, this appeal does not present substantial federal questions warranting the attention of this Court.

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CONCLUSION

The Georgia Supreme Court's decision to uphold the constitutionality of the Georgia wrongful death statute is correct. This appeal does not raise a substantial federal question because the predicate for invoking the Due Process Clause, the existence of a state-created property right, is missing. The challenged statutory scheme that

allegedly deprives the children is not wholly arbitrary or irrational, and recognition of the procedural right claimed would undercut the lawful interest of the state in streamlining wrongful death claims and in avoiding intrafamily squabbles such as this one. It is respectfully submitted that the appeal should be dismissed or affirmed.

Respectfully submitted,

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